SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1566

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, A CORPORATION,

*Petitioner,*

*vs.*

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, A CORPORATION,

*Respondent.*

HARRIS TRUST AND SAVINGS BANK,

*Petitioner,*

*vs.*

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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## PETITION FOR WRIT OF CERTIORARI.

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## OPINIONS BELOW.

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The decision of the United States District Court for the Northern District of Illinois, Eastern Division, as reported in 301 F. Supp. 72 (1969), is reproduced in Appendix "A," *infra.*

The Court of Appeals for the Seventh Circuit affirmed the District Court's judgment by an opinion reported in 437 F. 2d 6 (1971), which is reproduced in Appendix "B," *infra.*

## JURISDICTION.

The judgment of the Seventh Circuit was dated and entered on January 19, 1971 and a petition for rehearing filed by petitioners, Chicago, Rock Island and Pacific Railroad Company and Harris Trust and Savings Bank,* was denied on February 22, 1971.

The jurisdiction of this Court to review the judgment entered herein by the Seventh Circuit is invoked under 28 U. S. C. § 1254(1).

## QUESTIONS PRESENTED.

1. Whether the Seventh Circuit erred in holding that federal public policy was not violated by a contract which deprived Rock Island of all remedies under the Interstate Commerce Act for damages sustained as a result of unsafe rail operations declared unlawful by that Act.

2. Whether the Seventh Circuit erred in concluding that a contract between Rock Island and respondent, Chicago, Burlington and Quincy Railroad Company,** was not a "trackage rights agreement," which must be specifically approved by the Interstate Commerce Commission pursuant to the Interstate Commerce Act.

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* Petitioners are hereinafter referred to as "Rock Island."

** Respondent is hereinafter referred to as "Burlington."

## STATUTES INVOLVED.

The statutory provisions involved in this case are voluminous, and are therefore reproduced verbatim in Appendix "C," *infra*. Citations of the statutes involved are as follows:

Title 49 U. S. C. § 1(3)(a).
Title 49 U. S. C. § 8.
Title 49 U. S. C. § 5(2).
Title 49 U. S. C. § 5(4).
Title 49 U. S. C. § 26.

## STATEMENT OF THE CASE.

Burlington's high speed passenger train collided head-on into a motionless Rock Island passenger train, resulting in loss of life, numerous injuries, and substantial property damage to both rail carriers. The circumstances of the collision, as set forth in the opinion of the Seventh Circuit, are as follows:

> "Commencing on September 25, 1964, the Chicago, Rock Island and Pacific Railroad Company was unable to use its own line to Chicago because of a defective bridge at Joliet, Illinois. Therefore, the Rock Island began to detour its trains over Burlington's Streator branch to Montgomery pursuant to a reciprocal Standard Form for Detour Agreement that had been executed by the two railroads in January 1958.

> On the night of September 27, 1964 an eastbound Rock Island passenger train received a stop signal and thereupon halted on the Streator branch a few hundred feet short of the signal bridge of the Burlington's main line. At this time, a Burlington train speeding westward on the main line received a proceed signal and ran head-on into the Rock Island train, killing 4 persons, injuring 250 others, and destroying over $1,000,000 in property . . ." (Appendix "B," *infra*, p. 2b).

The train collision was a direct result and in consequence of Burlington's unlawful violations of Section 25 of the Interstate Commerce Act, 49 U. S. C. § 26, and of an Interstate Commerce Commission Order issued pursuant thereto, 49 CFR § 136, in that Burlington had used a switching signal system that was not in proper condition and not safe to operate.

Rock Island instituted this litigation by filing its complaint in the District Court against Burlington seeking recovery of the damages sustained by it in the collision. Rock Island's claim for relief was brought under Section 8 of the Interstate Commerce Act, 49 U. S. C. § 8. Burlington disputed Rock Island's right to maintain a federal cause of action under Section 8 of the Interstate Commerce Act, and denied any violation of that Act. By way of affirmative defense and counterclaim with no independent basis of federal jurisdiction, Burlington asserted that an agreement executed by the parties in January, 1958, exempted Burlington from any liability to Rock Island and obligated Rock Island to indemnify Burlington for its damages.

The District Court held that Rock Island was a ". . . person injured . . ." under Section 8 of the Interstate Commerce Act, and entitled to maintain a federal cause of action for damages sustained as a result of unsafe rail operations in violation of the Act. The District Court further found that the train collision which occasioned Rock Island's injury was ". . . a direct result and in consequence of . . ." Burlington's violations of Section 25 of the Interstate Commerce Act, 49 U. S. C. § 26, and the Interstate Commerce Order issued pursuant thereto, 49 CFR §§ 136 *et seq.** (See Appendix "D," *infra*, reproducing the District Court's Findings of Fact.) However, the District Court then held that an agreement between Rock Island and Burlington, interpreted to vitiate entirely Rock Island's right of recovery under the Interstate Commerce Act and to visit all liability for Burlington's damages upon Rock Island, was consistent with federal public policy (See Appendix "A," *infra*).

The Seventh Circuit affirmed the District Court's holding that the agreement, interpreted to destroy all protections afforded Rock Island under the Interstate Commerce Act was consistent with federal public policy. The Seventh Circuit further considered and rejected Rock Island's contention that the agreement between the parties was in fact a "trackage right agreement" as defined by Section 5(2) of the Interstate Commerce Act, 49 U. S. C. § 5(2), void and unenforceable because it had not been approved by the Interstate Commerce Commission (See Appendix "B," *infra*).

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* For simplicity, the term "Federal Safety Appliance Act" will hereinafter be used to designate the applicable statute and Order of the Interstate Commerce Commission.

## REASONS FOR GRANTING THE WRIT.

As shown in Point I below, if Rock Island is entitled to pursue its remedy under Section 8 of the Interstate Commerce Act in a federal forum as a "person" protected from violations of the Federal Safety Appliance Act, the Seventh Circuit's holding that an agreement obviating those rights does not violate public policy is manifestly untenable. The decisions of both this Court, other Circuits and the Illinois Supreme Court are crystal clear that federal public policy will not permit contractual agreements whereby those in violation of federal statutes are permitted to escape liability *vis-a-vis* members of the class of persons which Congress intended to protect. Moreover, that issue of public policy arising under the Interstate Commerce Act is an important question of federal law which has not been, but should be, resolved by this Court.

Point II, *infra,* will deal with the Seventh Circuit's additional finding that an agreement between the parties, the terms of which have never been reviewed by the Interstate Commerce Commission despite widespread use for over 50 years, is not a "trackage rights agreement" requiring approval by the Commission under Section 5(2) of the Interstate Commerce Act. That finding is in flat conflict with the pronouncements of the Interstate Commerce Commission defining "trackage rights agreements" under Section 5(2).

## I. THE SEVENTH CIRCUIT'S NULLIFICATION OF ROCK ISLAND'S STATUS AS A "PERSON INJURED" UNDER THE INTERSTATE COMMERCE ACT RAISES AN IMPORTANT ISSUE OF NATIONAL PUBLIC POLICY WHICH SHOULD BE RESOLVED BY THIS COURT.

Both in the District Court and in the Seventh Circuit, Rock Island asserted its claim for damages under Section 8 of the Interstate Commerce Act; damages which were the direct result of Burlington's undisputed violation of the Federal Safety Appliance Act. The District Court flatly rejected Burlington's argument that the protections afforded by Section 8 of the Interstate Commerce Act and the Federal Safety Appliance Act were limited to living persons, holding that the federal court had jurisdiction to adjudicate Rock Island's claim for damages:

> "The Burlington contends that the history and practice under the Interstate Commerce Act shows that this federal cause of action is limited to living persons, whose lives and limbs are put in jeopardy by a violation of the Safety Appliance Acts, and has never been extended to corporations. However, this overlooks the definition in 49 U. S. C. § 1(3)(a) that the 'term "person" as used in this chapter includes an individual, firm, copartnership, corporation, company, association, or joint stock association . . .' *Faced with this explicit inclusion of corporations into Section 8 by virtue of Section 1(3)(a), and the undisputed allegation of an injury because of an alleged violation of the Safety Appliance Acts, this court is of the opinion that jurisdiction is proper . . .*" Appendix "A," *infra*, pp. 6a-7a (Emphasis added).

Despite Rock Island's status as a "person" injured by Burlington's unlawful Federal Safety Appliance Act violations, the Seventh Circuit held that the indemnity provisions of the agreement should not "'. . . be invalidated as against public policy . . .'" and that ". . . the distribution of risks undertaken by this contract does not impair the

policies or force of the Federal Safety Appliance Act . . ." (Appendix "B", *infra,* p. 7b). Since, as was decided as an important issue of first judicial impression, a corporate victim such as Rock Island falls within the class of persons protected from hazardous rail operations by the Federal Safety Appliance Act and Section 8 of the Interstate Commerce Act, the above-quoted analysis by the Seventh Circuit is incompatible with the prior decisions of the Illinois Supreme Court, other Circuits, and this Court. In effect, the Seventh Circuit has nullified the remedy created by Section 8 of the Interstate Commerce Act for violations of the Federal Safety Appliance Act.

For example, the Seventh Circuit's attempt to distinguish *Boyer* v. *Atchison, Topeka and Santa Fe Ry. Co.,* 34 Ill. App. 2d 330, 181 N. E. 2d 372 (1st Dist. 1962), affirmed, 38 Ill. 2d 31, 230 N. E. 2d 173 (Ill. Sup. Ct. 1967), certiorari denied, 390 U. S. 949 , cannot withstand analysis. In *Boyer,* plaintiff, the holder of a free pass, was injured while traveling on defendant's train. Under the terms of the pass, the defendant railroad attempted to exonerate itself from liability for the ". . . negligence of servants or otherwise . . ." Injured as a result of defendant railroad's violation of a Federal Safety Appliance Act, 49 U. S. C. § 2, plaintiff sued for damages. The defendant in *Boyer,* like the Burlington in this case, first argued that plaintiff was not included in the class of persons protected by the Federal Safety Appliance Act and, hence, had no standing to sue for damages. And, as in this case, both the appellate and Illinois Supreme Court decisions in *Boyer* rejected defendant's challenge to the plaintiff's standing, holding that the plaintiff was properly within the class of persons protected by the Federal Safety Appliance Act (See 34 Ill. App. 2d 330, 336-37, 181 N. E. 2d 372, 376; 38 Ill. 2d 31, 37-38, 230 N. E. 2d 173, 177). The Illinois Supreme Court quoted with approval the language of

this Court in *Coray* v. *Southern Pacific Co.*, 335 U. S. 520 (1949):

> "[T]his Act, fairly interpreted, must be held to protect *all who need protection from dangerous results due to maintenance or operation of congressionally prohibited defective appliances* . . ." 335 U. S. 520, 522-23 (Emphasis added).*"

Given the basic premise that both plaintiff in *Boyer* and Rock Island were intended to enjoy the protection of safe rail operations demanded by the Federal Safety Appliance Act (else their respective claims should have been summarily dismissed for lack of standing), the holding in *Boyer* as to public policy is directly contrary to the opinion of the Seventh Circuit. In sharp contrast to the reasoning of the Seventh Circuit, the Illinois Supreme Court struck down the disclaimer provision in *Boyer* if interpreted to obviate defendant's violation of the Federal Safety Appliance Act as follows:

> "As the appellate court stated in its opinion, it is clear that the Federal Safety Appliance Act expresses the policy of the United States that the railroad's duty to equip and maintain its cars with secure and efficient couplers is absolute. *Under such a policy which imposes an absolute duty to provide for public safety it would be incongruous to allow the doctrine of assumption of risk to be employed by the defendant to avoid this responsibility to one for whose benefit the statute was enacted* . . . Under these circumstances and in view of the absolute standard imposed by the Act, *we deem that to enforce the exculpatory provisions of the pass would subvert the purpose of the Act and defeat the public interest* . . ." 38 Ill. 2d 31, 38-39, 230 N. E. 2d 173, 178 (Emphasis added).

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* See also *Brady* v. *Terminal RR Ass'n*, 303 U. S. 10, 15 (1937) wherein this Court described the comprehensive scope of the Federal Safety Acts ". . . so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the Act . . ."

Thus, the Supreme Court of Illinois in *Boyer* holds squarely that one within the class of persons protected by the Federal Safety Appliance Act *may not* bargain away his rights *vis-a-vis* the offending carrier. In contrast, the Seventh Circuit holds that Congressionally protected victims such as Rock Island *may*, consistent with public policy, bargain away their rights *vis-a-vis* the offending carrier. Indeed, the Seventh Circuit's opinion goes much further, holding that not only has Rock Island bargained away its own claim for damages, but has also lawfully contracted to pay all of the offending party's damages.

The Seventh Circuit's holding regarding public policy is also in conflict with the prior decisions of this Court and other Circuits, which have uniformly struck down attempts to subvert various federal statutes by contract. This Court's attitude toward disclaimers of liability thrust upon members of a class protected by Congress is reflected in *Brooklyn Bank* v. *O'Neil*, 324 U. S. 697 (1945):

> "It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released, if such waiver or release contravenes the statutory policy. [Citing cases.] Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designated to effectuate . . ." 324 U. S. 697, 704.*

* See also *United States* v. *United States Cartridge Co.*, 198 F. 2d 456 (8th Cir. 1957), wherein the Eighth Circuit reiterated the public policy considerations applicable to federal safety statutes as follows: "It is well-settled, of course, that the law will not sustain a covenant of immunity which protects against fraud, contravenes public policy, is prejudicial to the public welfare, is contrary to good morals, *or relieves one of duty imposed by law for the public benefit* . . ." 198 F. 2d 456, 464 (Emphasis added).

With regard to common carriers, this Court and other Circuits have been especially reluctant to allow disclaimers of liability where such disclaimers contravene a concurrent duty owed to a member of a class placed in a position of peril by a carrier's activities, *Midstate Co.* v. *Penna. R. Co.*, 320 U. S. 356, 361 (1943). In *Bisso* v. *Inland Waterways Corp.*, 349 U. S. 85 (1955), this Court struck down an agreement waiving a tugboat's liability for negligence as contrary to federal public policy. And in *Northwest Airlines, Inc.* v. *Alaska Airlines, Inc.*, 351 F. 2d 253, 258 (9th Cir. 1965), the Ninth Circuit voided an agreement exempting Northwest from liability when an Alaska Airlines plane crashed as a result of Northwest's wrongdoing.

The rationale of the Illinois Supreme Court's decision in *Boyer, supra,* with regard to the Federal Safety Appliance Act, as well as the decisions of this Court and other Circuits dealing with federal public policy are clear. One may not validly disclaim liability *vis-a-vis* a member of a class intended to be protected from injury as a matter of federal public policy. As a member of the class of "persons injured" intended to be afforded the protections of the Federal Safety Appliance Act and the remedy afforded by Section 8 of the Interstate Commerce Act, Rock Island may not be deprived of those rights by contract with Burlington, the offending carrier. The contrary decision of the Seventh Circuit, in conflict with both the Illinois Supreme Court, this Court, and other Circuits should thus be reviewed and reversed. *California* v. *Taylor,* 353 U. S. 553 (1957); *United States* v. *Seaboard Air Line Railroad Co.*, 361 U. S. 78 (1959). This is an important question of federal public policy which has not been, but should be, resolved by this Court.

Rock Island's status as a member of the class which Section 8 of the Interstate Commerce Act and the Federal

Safety Appliance Act were intended to protect from inherently unsafe rail operations likewise renders the cases relied upon by the Seventh Circuit totally inapposite. See *Inland Container Corp.* v. *Atlantic Coast Line RR. Co.*, 266 F. 2d 857, 861 (5th Cir. 1959); *Chicago & N. W. Ry. Co.* v. *Davenport*, 205 F. 2d 589, 594 (5th Cir. 1953); *Jacksonville Terminal Co.* v. *Railway Express Agency, Inc.*, 296 F. 2d 256, 259 (5th Cir. 1961), certiorari denied, 369 U. S. 860; *Colorado Milling & Elevator Co.* v. *Terminal RR. Association*, 350 F. 2d 273, 278-279 (8th Cir. 1965), certiorari denied, 382 U. S. 989, cited by the Seventh Circuit (Appendix "B", *infra*, p. 7b). In every case upon which the Seventh Circuit relies, the injured victim of a carrier's Federal Safety Appliance Act violation had already been fully compensated for his damages by the offending carrier.* The dispute in all these cases was not, as in Rock Island's dispute with Burlington, between the statutorily protected victim and the offending carrier. Rather, the issue in the *Inland Container, Chicago & N. W., Jacksonville,* and *Colorado Milling* cases, *supra*, was which of two parties (neither protected by the Interstate Commerce Act nor injured by its violation) would indemnify the other for damages already awarded to the victim of a Federal Safety Appliance Act violation. In this case, it is Rock Island which is every bit as much a victim of Burlington's Federal Safety Appliance Act violations as those individual victims who successfully recovered in the cases relied upon by the Seventh Circuit.

Moreover, the Seventh Circuit's additional observation that the agreement between Rock Island and Burlington merely adjusts ". . . the private relations between the two carriers, but did not alter their duties to the public as common carriers . . ." (Appendix B, p. 7b, *infra*)

* See 266 F. 2d 857, 859-60; 205 F. 2d 589, 591; 269 F. 2d 256, 258; 350 F. 2d 273, 275.

is rendered a complete *non sequitur* by Rock Island's status as a "person" protected by the Interstate Commerce Act. Once it is determined that Rock Island has standing to maintain an action for damages under Section 8 of the Interstate Commerce Act as a member of the public protected by the Federal Safety Appliance Act, Burlington owes the same absolute duty of safe rail operations to Rock Island as to any other member of that protected class. In short, if the purpose of the Federal Safety Appliance Act is to protect the "public," and Rock Island is held to be a member of that class, Burlington is deprived of any "private" status in the duties owed Rock Island under that Act.

## II. THE SEVENTH CIRCUIT'S HOLDING THAT THE AGREEMENT BETWEEN THE PARTIES IS NOT AN UNLAWFUL "TRACKAGE RIGHTS AGREEMENT" CONFLICTS WITH THE DECISIONS OF THE INTERSTATE COMMERCE COMMISSION.

On appeal to the Seventh Circuit, Rock Island argued that the agreement between the parties (See Appendix "E," *infra*), under the terms of which Burlington was awarded judgment, was in fact a "trackage rights agreement," which must be specifically approved by the Interstate Commerce Commission under Section 5(2) of the Interstate Commerce Act, 49 U. S. C. § 5(2). While that agreement has been in industry-wide use since 1905, it is conceded that the I. C. C. has never approved the agreement under Section 5(2). Rock Island further argued that the lack of I. C. C. approval under Section 5(2) rendered the agreement void and unenforceable as a violation of Section 5(4) of the Interstate Commerce Act, 49 U. S. C. § 5(4). See this Court's opinion in *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134, 146-148 (1946) as well as *Chicago & N. W. Ry. Co.* v. *Peoria & P. U. Ry. Co.*, 201 F.

Supp. 241 (N. D. Ill. 1962), affirmed, 319 F. 2d 117 (7th Cir. 1963), certiorari denied, 375 U. S. 969. Rejecting Rock Island's arguments, the Seventh Circuit held as a matter of first impression that the agreement "... does not constitute a 'trackage right' agreement within the purview of Section 5(2)(a)(ii) of the Interstate Commerce Act ..." (Appendix "B," *infra,* p. 8b).

The Seventh Circuit's conclusion is in irreconcilable conflict with the definitions of "trackage rights agreements" formulated by the Interstate Commerce Commission, which is granted *exclusive jurisdiction* to administer the provisions of Section 5(2) of the Interstate Commerce Act.* The term "trackage rights" in Section 5(2) was first defined by the Interstate Commerce Commission in *Texas Midland Railroad,* 75 I. C. C. 1 (1918):

> "It often happens that a carrier which owns and uses its property gives to some other carrier a qualified use in that property in common with itself. Such use is generally denominated a trackage right, and is the right to use the tracks of the owner for a compensation usually varying with the extent of the use ..." 75 I. C. C. 1, 123.

Again, in *Louisiana A. & T. Ry. Co.,* 170 I. C. C. 602, 606 (1931) "trackage rights" under Section 5(2) were described as "... the right of one carrier to use the tracks of another for a compensation usually varying with the extent of use ..."

The agreement between Rock Island and Burlington clearly falls within the ambit of the Interstate Commerce Commission's above-quoted definitions of "trackage rights" under Section 5(2). To paraphrase the *Texas*

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* As stated by this Court in *Thompson* v. *Texas Mexican R. Co.,* 328 U. S. 134 (1946) "... § 5(2)(a) vests in the Commission, not the courts, the power to determine the terms and conditions under which trackage rights agreements may be acquired. The jurisdiction of the Commission is exclusive ..." 328 U. S. 134, 146-48.

*Midland* case, *supra,* the agreement provides ". . . that a carrier [Burlington] which owns and uses its property gives to some other carrier [Rock Island] a qualified use in that property . . ." (See Appendix "E," *infra,* ¶¶ 1, 2). Similarly, the agreement between Rock Island and Burlington expressly grants either carrier party ". . . the right to use the tracks of the owner for a compensation . . . varying with the extent of use . . ." (Appendix "E," *infra,* ¶ 3).

The Seventh Circuit's refusal to apply the Interstate Commerce Commission's definitions of "trackage rights" is totally unsupported by law. For example, the opinion attempts to construct the distinction that while the present agreement is limited to ". . . extraordinary circumstances which countenance no enduring relationship . . .," "trackage rights" involve ". . . continuing or permanent easements or licenses granted to a foreign carrier . . ." (Appendix "B," *infra,* p. 8b).

While it is true that most "trackage rights" agreements contemplate a degree of permanence, duration of use is clearly not a controlling indicia under Section 5(2). As pointed out in the *Texas Midland* case, *supra,* the use of "trackage rights" may be ". . . occasional, but once a week, or even once a year . . ." (75 I. C. C. 1,125). The Interstate Commerce Commission has previously scrutinized "trackage rights" agreements under Section 5(2) which contemplate the use of a foreign carrier's tracks ". . . (o)nly in the event of an emergency . . ." *Chicago S. S. & S. B. R. Trackage Rights, Cook County, Ill.,* 307 I. C. C. 329, 343 (1959).

Moreover, the *terms of the agreement,* which are exactly what the Commission must find to be "just and reasonable" under Section 5(2) of the Interstate Commerce Act, are by no means temporary. The basic agreement was promulgated in 1905, and there have been no amendments

whatsoever since 1957. It is hard to imagine a more "enduring" agreement than that which forms the basis of the controversy between Rock Island and Burlington. Yet not one single term of that agreement has been found "just and reasonable" by the Interstate Commerce Commission, even though that agreement has now been interpreted by the Seventh Circuit to nullify provisions of the Interstate Commerce Act itself, over which the I. C. C.'s jurisdiction is plenary.

Likewise, the Seventh Circuit's attempt to distinguish the agreement between Rock Island and Burlington from a "trackage rights" agreement because the present agreement ". . . is subject to the discretionary power of the Home Company to grant or deny permission to the detouring road to operate over its tracks . . ." (Appendix "B," *infra,* p. 8b) suffers from a fatal misconception regarding the nature of transactions under Section 5(2). *All transactions* subject to the approval of the Interstate Commerce Commission under Section 5(2), from "trackage rights" to railroad unifications, are consensual in nature, with either carrier party having ". . . discretionary power . . . to grant or deny permission . . ." to participate. Only when two or more carriers have consented to enter into a Section 5(2) transaction is the Interstate Commerce Commission empowered to approve its terms as "just and reasonable." See, *e.g., St. Joe Paper Co.* v. *Atl. Coast Line R. Co.,* 347 U. S. 298, 305 (1953). Accordingly, the reasoning of the Seventh Circuit denying that the agreement herein is a "trackage rights agreement" requiring approval by the Interstate Commerce Commission, is unsupported by the decisions of that agency.

## CONCLUSION.

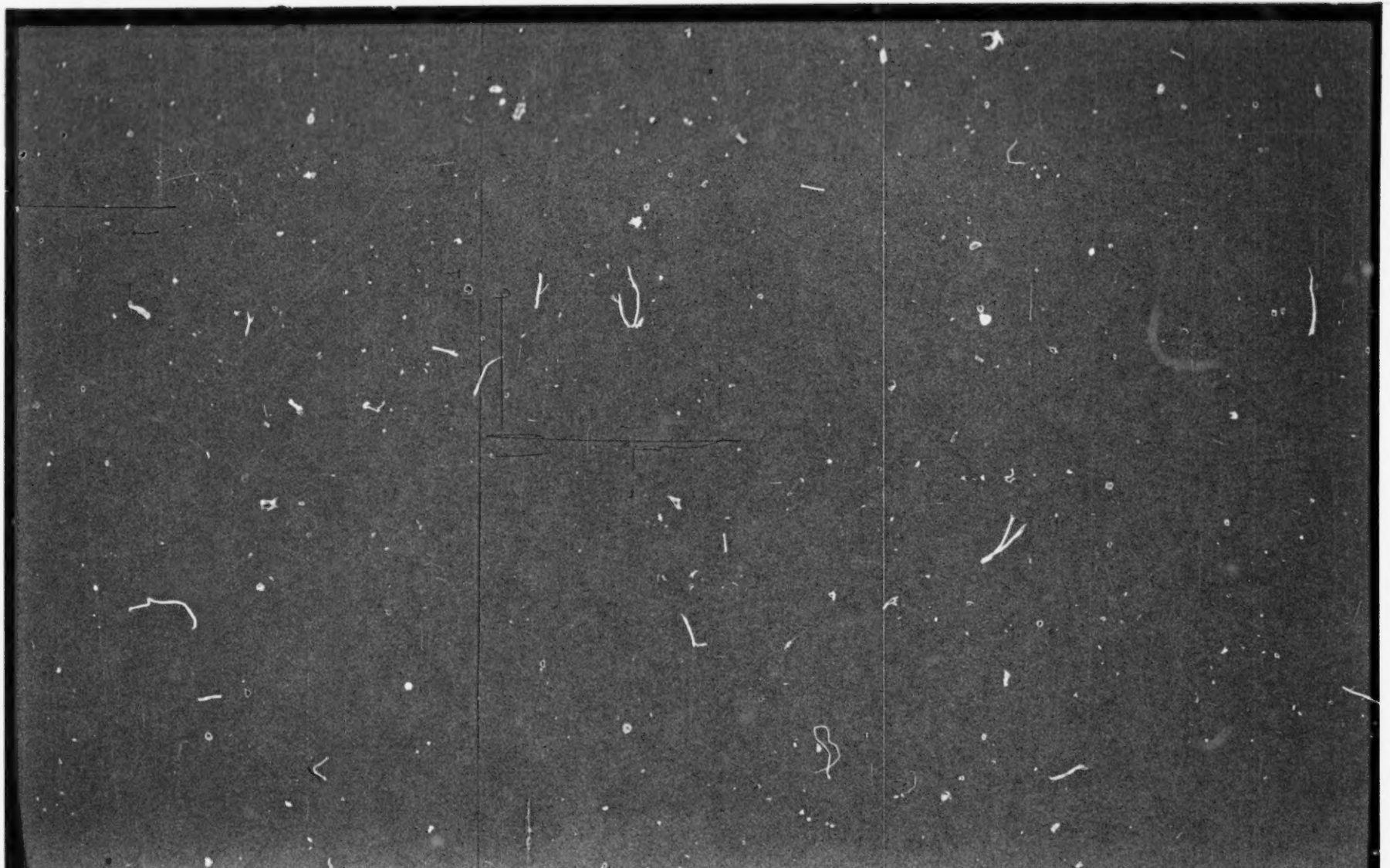
For the reasons set forth above, Rock Island submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 7, 1971.



## APPENDIX A.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, A CORPORATION,
*Petitioner,*

*vs.*

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, A CORPORATION,
*Respondent,*

HARRIS TRUST AND SAVINGS BANK,
*Petitioner,*

*vs.*

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,
*Respondent.*

Nos. 17939 and 17940 Consolidated.
The Honorable EDWIN A. ROBSON, District Judge.

### MEMORANDUM AND ORDER.

The plaintiffs have sued the defendant for damages arising out of a train disaster. The defendant counterclaimed for a declaratory judgment that an agreement between the parties placed the loss on the plaintiff railroad. After briefs were submitted on certain legal issues, a hearing was held. Post-hearing briefs were filed, and the court took the case under advisement. For the reasons set

forth below, this court is of the opinion that judgment should be rendered for the defendant.

On September 25, 1964, the plaintiff[1] Chicago, Rock Island and Pacific Railroad Company ("Rock Island") was unable to use its own tracks to Chicago, because of a defective bridge at Joliet, Illinois. Under a long-standing prior agreement, standardized for the railroad industry, the Rock Island detoured its trains over the defendant Chicago, Burlington & Quincy Railroad Company's ("Burlington") Streator Branch tracks, which connected with the Burlington's line at Ottawa, Illinois.

The Burlington, at this time, was in the process of completing a change-over, in its system of switching, from manual and mechanical power to electrical power. At the Montgomery Interlocking Station, electrical motors had been installed to replace the mechanical moving of the switches, but the complete change-over to remote control had not been finished, since the levers still had to be operated manually. The Streator Branch of the Burlington connected with Burlington's main tracks by means of Switches 12 and 14, located about 0.2 miles from the Montgomery Interlocking Station. For a train traveling east to Chicago to pass from the Streator Branch onto Track No. 2, Switch No. 14 had to be in "Reverse" position. Inside the Montgomery Station, this was indicated on a board by a red light under the letter "R" for "Reverse." For a train traveling west from Chicago to travel straight through on Track No. 2 without passing onto the Streator Branch tracks, Switch No. 14 had to be in "Normal" position, indicated by a white light under the letter "N" inside the Montgomery Station. There was a locking lever

1. Harris Trust and Savings Bank is also a plaintiff, by virtue of its ownership of one of the demolished Rock Island locomotives. Since the Bank's rights depend on the Rock Island's rights, the singular "plaintiff" will also include the Bank.

for each switch, and, before a train could be given a signal to proceed in a certain direction, the locking lever had to be pulled. Although it is stipulated that the Burlington did not know at the time, it was possible to give a "proceed" signal without Switch No. 14 being in the desired position. The electrical motors took from 2.2 to 2.6 seconds to begin the actual moving of the switch. If the locking lever was pulled during this period, the switch would remain in its original position, and allow the erroneous "proceed" signal to be given. If the locking lever was engaged *after* this short period, the "proceed" signal could not be given if the switch was still in the original undesired position.

At about 8:45 p.m. on September 27, 1964, Rock Island Train No. 4 eastbound to Chicago from New Mexico and Iowa, left Ottawa, Illinois, and entered the Burlington's Streator Branch tracks. At this time, Switch No. 14 was in "Reverse" position to allow Rock Island Train No. 4 to travel to Chicago from the Streator Branch to the main Track No. 2. Both signal bridges, east and west, indicated that any trains on Tracks Nos. 1, 2 or the Streator Branch tracks should stop. At about 10:15, the situation was still the same: Switch No. 14 in "Reverse" with the red light on in the Montgomery Station, and both signal bridges indicating "Stop."

When Rock Island Train No. 4 did not appear at the scheduled time, the operator in the Montgomery station was instructed by the Burlington dispatcher's office in Aurora to place Switch No. 14 in the "Normal" position to allow Burlington Train No. 3 to proceed westward straight through on Track No. 2. This was at about 10:40 p.m. This operator pulled the levers for Switch No. 14, locked it, and was able to give a "proceed" signal going west on Track No. 2. He then left to observe the

passing Burlington train for hot boxes, sticking brakes, and anything which might have been dragging. However, Switch No. 14 had not moved from its original "Reverse" position, and the red light was still on in the Montgomery station. Apparently, the operator in his rush to get outside to watch the passing train (part of his duties), did not notice the red light. It seems that he had pulled the locking lever within the 2.2 or 2.6 second period mentioned above, and was therefore able to pull the lever which gave the "proceed" signal for westward movements on Track No. 2.

Rock Island Train No. 4 arrived on the Streator Branch at about 10:45 p.m., and since the "stop" signal was still in effect for eastward movements, Train No. 4 stopped a few hundred feet short of the signal bridge. The Burlington Train No. 3, after being given the "proceed" signal (to move at unrestricted speed), was moving westward on Track No. 2 at about 62 miles per hour as it approached the Montgomery Station and Switch No. 14. The engineer saw that Switch No. 14 was in a reverse position and shortly before reaching it, slammed on the emergency braking system. It was not enough. The Burlington train collided head-on at 52 miles per hour with the waiting Rock Island train. Four railroad employees lost their lives, and 215 persons were injured. The property damage was well over one million dollars, including the destruction of two Rock Island and two Burlington locomotives. On January 10, 1958, the Rock Island and the Burlington entered into the Standard Form for Detour Agreement. Exhibit F, Stipulation of Facts. This is an Association of American Railroads (AAR) form adopted in 1905. In Paragraph 4, in dispute here, the Rock Island agreed with the Burlington to be liable without regard to fault for almost every loss that might occur while the Rock Island

was detouring on Burlington's track. This lengthy reciprocal agreement provides:

> "The Home Company [Burlington] shall not be held liable for or on account of *any* loss, damage, or delay, to the trains, engines, cars or other property of *any* kind of *either* company, nor to freight, baggage or other property of *any* kind carried in or upon such trains, engines or cars, nor for or on account of *any* injury to or death of passengers or employees of *either* company, or for or on account of *any* injury to the person or property of *any* other individual or individuals, company or companies, corporation or corporations *whatsoever,* which may be incurred or sustained by reason of such trains being detoured, or by reason of such trains being delayed in such detouring, in *whatever* manner the same may be caused or occasioned, *whether by or through the negligence of the Home Company [Burlington], its agents or servants, or by reason of defects in tracks, structures or facilities furnished by the Home Company, or otherwise,* it being understood and agreed that *all* risk of such delays, loss, damage, injury and death shall be and is hereby assumed by the Foreign Company [Rock Island], and the Foreign Company shall and will hold *harmless* the Home Company from and against *all* liabilities or claims for *all* such delay, loss, damage, injury and death, and shall and will execute and deliver . . . to the Home Company, upon request, a full and complete release, satisfaction and discharge of *all* claims therefor, and will pay . . . *all* costs and expenses incurred by *either* Company in the clearing of wrecks and repairs to equipment, track and property in which by reason of detour movements covered by this agreement the *engines, trains or cars of the Foreign Company [Rock Island] are concerned, expenses and attorney's fees* incurred in defending any action which may be brought against the Home Company on account of *any* such claim or liability and *any* judgment which may be rendered against the Home Company on account thereof. The Foreign Company shall pay all

> fines, penalties, costs and expenses imposed upon or incurred by the Home Company by reason of any violation by the Foreign Company of the Safety Appliance or other State or Federal Laws, and hold the Home Company harmless therefrom." (Emphasis added.)

For the purposes of argument, the Burlington admits that it committed a violation (though unwittingly) of the Safety Appliance Acts.[2] However, the Burlington claims that this Detour Agreement covers the conduct involved in this disaster, and that, therefore, the Rock Island must pay all the losses, which are stipulated to be $563,699.17 for the Rock Island and the Bank, and $786,718.62 for the Burlington, plus attorney's fees and costs. The parties also agreed that the party held responsible here will defend and be responsible for all pending suits. The Rock Island argues that the Detour Agreement does not cover a violation of the Safety Appliance Acts, and that, if it does cover such a violation, it is void as a violation of public policy.

Jurisdiction of the court is founded on 49 U. S. C. § 8, which provides that if a carrier subject to the Interstate Commerce Act does anything in violation of that Act, "such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation . . . , together with a reasonable counsel or attorney's fee. . . ." The Burlington contends that the history and practice under the Interstate Commerce Act shows that this federal cause of action is limited to living persons, whose lives and limbs are put in jeopardy by a violation of the Safety Appliance Acts, and has never been extended to corporations. How-

2. The Burlington pleaded *nolo contendere* to a civil charge of a violation of the Federal Safety Appliance Acts. *United States* v. *Chicago, Burlington & Quincy Railroad Co.*, 65 C 1191 (N. D. Ill. October 28, 1965); 49 U. S. C. § 25(e); 49 C. F. R. §§ 136.303 and 136.307. Without admitting a violation, "in order to avoid the time and expense of litigation," the Burlington paid the $100 penalty.

ever, this overlooks the definition in 49 U. S. C. § 1(3)(a) that the "term 'person' as used in this chapter includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof." Faced with this explicit inclusion of corporations into Section 8 by virtue of Section 1(3)(a), and the undisputed allegation of an injury because of an alleged violation of the Safety Appliance Acts, this court is of the opinion that jurisdiction is proper.

*Coverage of the Detour Agreement.*

The Detour Agreement, quoted above, could not contain more words denoting a desire to include virtually every kind of loss that might occur while the Rock Island was operating on the Burlington's tracks. Apparently because most cases relating to the agreement have been submitted to arbitration or settled, Paragraph 7, Exhibit F, Stipulation of Facts, research reveals only one case which has construed the Detour Agreement. *The Alabama Great Southern Railroad Co.* v. *Louisville and Nashville Railroad Co.*, 127 F. Supp. 363 (N. D. Ala. 1955), *reversed on other grounds*, 224 F. 2d 1 (5th Cir. 1955). The court, at 368, noted this fact:

> "Strikingly noteworthy of comment is that for nearly fifty years the railroads have been content to solve the problems arising under similar agreements without resorting to the courts for their construction or application."

The Court held that there was no need to prove that the Foreign Road proximately caused the injury. The court said, at 370:

> "[I]t would seem that the clause, '*by reason of such trains being detoured*,' serves the function only of eliminating from the indemnity provisions those losses

> and damages in which the detouring train had no part whatsoever."

In reaching this conclusion, the court took into account the factor that this contract was

> "entered into between two corporations moving in an area of comparative economic equality, dealing with the familiar transaction of their everyday concerns, couched in the terse language of businessmen, intended to apply to an almost infinite variety of prospective and undetermined events, [and] the contract should be read, not with the thought of measuring it by the precision of legalistic niceties, but with an eye single to discerning the intentions of the parties." *Id.*, at 369-70.

Although the court held that the words "or otherwise" are not to be construed as a catchall for every type of conduct, and that the term "negligence" did not include "wilful and wanton" negligence, the court generally gave the contract broad effect.

In holding that the contract did not violate public policy (excluding wilful and wanton conduct), the court said, at 371:

> "Enough has been written to indicate the view of the court that the indemnity and exemption provisions of the detour agreement, limited by the foregoing construction to losses and damages resulting from simple negligence, are inoffensive to public policy. Generally, cases cited by the defendant as holding to the contrary may be distinguished. Most of them relate to arrangements that would deprive a member of the public, situated at an economic disadvantage, of relief from damages caused by the simple negligence of a party required by the public interest to accept responsibility."

The Court of Appeals for the Fifth Circuit, in affirming this construction, said (224 F. 2d at 4) that they were

> "in general agreement with [the lower court's] expressed view that the detour agreement was valid and

> effective as to all losses and damages caused and occasioned by negligence or otherwise, except that its terms did not extend to or include wanton negligence or willful acts and that, if they did, the agreement would, to that extent, be illegal and unenforceable."

The Rock Island contends that, since the Federal Safety Appliance Acts impose absolute liability for violations, the term "negligence" in the Detour Agreement does not include violations of the Federal Safety Appliance Acts.

The Seventh Circuit Court of Appeals has held that violations of the Safety Appliance Acts are "negligence per se," which is merely another way of saying "absolute" or "strict" liability. *Chicago, Milwaukee, St. Paul and Pacific Railroad Co.* v. *Alva Coal Corporation,* 365 F. 2d 49, 54 (7th Cir. 1966), and cases cited therein. The *Alva* case dealt with a so-called "sidetrack" agreement made between a railroad and another company (usually a shipper) for the transfer of railroad cars from the main tracks to a side track under the control of the shipper. The Rock Island argues that this is a sufficient distinction between the *Alva* case and the present case. However, the court was concerned in *Alva* not only with the effect of the facts, but the construction of an agreement which used the term "negligence" in a similar manner as it is used in the instant Detour Agreement. The court held that the term "negligence" included the concept of "negligence *per se*" or absolute liability. To this court, the distinctions do not make a substantial difference in defining the same term in the Detour Agreement. It therefore appears that the conduct, which would ordinarily be no more than simple negligence (and clearly not wilful or wanton conduct), though classed by statute under the concept of absolute liability, is covered by the Detour Agreement.

In addition, the next phrase, using the disjunctive "or", that all losses are indemnified by the Foreign Company

which arise from "defects in tracks, structures, or facilities furnished by the Home Company, or otherwise . . . ," clearly covers the conduct in this case. The testimony revealed that one wire, costing a few pennies, could have averted the disaster. But the testimony also revealed that the structures operated efficiently for 40 years, and the need for the addition of the wire could not have been determined from a study of the electrical diagrams. The lack of this wire was certainly a "defect" in terms of the Detour Agreement. The Rock Island contends that, for there to be a defect, there must be an existing structure for there to be a defect in, and since there was no wire, there could be no defect. This is, however, a mere game of semantics. The structure that was defective was the switching mechanism and it was the very lack of the wire which made it defective. Websters New International Dictionary (2d Edition 1953) defines "defect" as a "[w]ant or absence of something necessary for completeness or perfection; deficiency." That the switching mechanism was not complete or perfect is beyond question. The agreement under this clause covers the conduct in question.

The Rock Island further argues that the second sentence shows that the Burlington should be held liable. The second sentence, added in 1913, says that the Foreign Company (Rock Island here) is liable for all the fines, penalties, costs and expenses as a result of violations of the Safety Appliance Acts. The Rock Island argues that this means that each company was to bear its own expenses, etc., whenever a Safety Appliance Act violation occurred, and that, therefore, the Burlington should be liable for the present claims. This interpretation might be acceptable if this second sentence stood alone. The first sentence, however, does not mention fines and penalties, and this second sentence was added to cover such statutory fines and penalties incurred by the Foreign Company, and is silent as to

the Home Company's obligations. The fact that the Burlington entered a *nolo* plea, thereby not admitting liability, and paid the $100 penalty "to avoid the costs of litigation," does not mean that the Burlington was acting on the interpretation of the agreement that the Rock Island suggests. However, extrinsic evidence cannot be introduced except to show the lack of a contract, to clarify an ambiguity, or to demonstrate a custom or practice. *E.g.*, *Hammer* v. *Sanders*, 8 Ill. 2d 414 (1956), cited in *Pennsylvania Railroad Co.* v. *Indiana Harbor Belt Railroad Co.*, 159 F. Supp. 19, 25 (N. D. Ill. 1958). The plaintiff admits that the contract is valid insofar as "simple" negligence is concerned. This court has held that the contract is not ambiguous insofar as its application to the conduct here in question, and the Rock Island has not submitted any evidence that would support a finding of a custom and practice. The construction urged by the plaintiff is not therefore a practical interpretation, given the sweeping language in the second sentence, and the lack of any explicit mention of the Home Company's violations.

*Public Policy.*

In a case involving the negligence of an employee of one of the parties (in lowering a crossing gate onto the back of a passenger on a motorcycle waiting for the train to pass), without the broad language in the Detour Agreement to fall back on, the court said there is no "public policy [which] forbids the plaintiffs from shifting the risk of loss from its own negligence or that of its employees onto the defendant by mutual assent." *Pennsylvania Railroad Co.* v. *Indiana Harbor Belt Railroad Co.*, *supra*, at 24. It is true, though, that a contract will not be construed to indemnify a party against his own misconduct unless the language of the agreement clearly warrants it. *E.g.*, *Halverson* v. *Campbell Soup Co.*, 374 F. 2d 810-813 (7th Cir.

1967). As discussed above, the Detour Agreement does clearly indemnify the Burlington for losses such as it has sustained here. Although the contract says that the Burlington "shall not be held liable," this court cannot read this clause to mean that the Burlington is wholly "exonerated" from liability. The Burlington is liable, but, by virtue of this agreement, the Rock Island has agreed to indemnify the Burlington for the losses resulting from the crash. If, by some chance, the Rock Island were in bankruptcy, or otherwise unable to pay, public policy would require a construction of the agreement which would demand that the Burlington assume the obligation to pay for such losses. Since "it is common knowledge that the device of insuring against one's own negligence through indemnity contracts is frequently employed in . . . business ventures" outside of the insurance industry, a contract, such as this one which was entered into by two parties of "equal bargaining power" on a form prepared by the members of the railroad industry and operating for over 50 years, shows that public policy is not offended by such indemnification. *E.g., Jacksonville Terminal Co.* v. *Railway Express Agency, Inc.*, 296 F. 2d 256, 262-263 (5th Cir. 1962).

If the Agreement left members of the public, passengers, or other individuals for whose benefit the Safety Acts were passed without any remedy, then there might be a violation of public policy. *Cf. Pennsylvania Railroad Co.* v. *Indiana Harbor Belt Railroad Co., supra; Boyer* v. *The Atchison, Topeka and Santa Fe Railway Co.*, 38 Ill. 2d 31 (1967). Here, however, the public will be protected, since either the defendant or the plaintiff will have to pay any valid claims resulting from the disaster. The fact that, in sustaining jurisdiction, this court has included the Rock Island under the language of 49 U. S. C. § 8 as one of the persons protected under the Federal Safety Appliance Acts, does not alter this conclusion. While it may be true that the

Rock Island has certain rights under the Safety Acts, it is equally true that it has bargained them away to a large extent in the Detour Agreement. In consideration for this, the Rock Island (and practically every other railroad in the United States) may impose the same indemnification obligation on the Burlington should the Burlington ever have to detour over the Rock Island's tracks.

The Rock Island further argues that by allowing this agreement to take effect as written, violations of the Federal Safety Appliance Acts are thereby encouraged. If the plaintiff were correct, all insurance or quasi-insurance contracts which provide for payment in the event of injury as a result of the negligence or wrongful conduct (not of course wilful or wanton conduct) of the indemnitee, would be held invalid as violative of public policy. Such contracts are not, however, violative of public policy. *E.g., Colorado Milling and Elevator Co.* v. *Terminal Railroad Association of St. Louis*, 350 F. 2d 273, 278 (8th Cir. 1965); *Ryan Mercantile Co.* v. *Great Northern Railway Co.*, 294 F. 2d 629, 634-636 (9th Cir. 1961); *The Alabama Great Southern Railroad Co.* v. *Louisville and Nashville Railroad Co., supra.* In addition, the severe consequences that might arise from a violation of the Safety Appliance Acts still act as a deterrent for future violations. In this case, a defect undiscovered for 40 years, to use the defendant's words, "exploded like a World War I mine." When it was going to "explode" could not have been foreseen. It did explode at a time when, by virtue of contract, one of the Rock Island trains was involved and was an indemnitor of the consequent damage. It could have happened when two of the Burlington trains were in similar positions. This possibility would be deterrent enough to someone who was in a position to alter the situation. The Burlington, it is stipulated, did not know and could not have corrected for the fault or defect beforehand. The plaintiff has not pre-

sented sufficient evidence to make out a case of wilful and wanton conduct, which would be necessary to declare the contract void as violating public policy.

As stated heretofore, the contract provides for final and binding arbitration of all situations relating to the detouring of trains. However, it is this court's opinion that the plaintiff has abandoned its claim for arbitration, as a matter of law. *The Alabama Great Southern Railroad Co.* v. *Louisville and Nashville Railroad Co.*, 224 F. 2d 1, 4-5 (5th Cir. 1955).

It is therefore ordered that judgment be rendered for the defendant Chicago, Burlington & Quincy Railroad Company in the amount of $786,718.62, plus costs and reasonable attorney's fees.

EDWIN A. ROBSON,
*Judge.*

July 15, 1969.

## APPENDIX B.

AN OPINION OF THE SEVENTH CIRCUIT COURT OF APPEALS.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, A CORPORATION,

*Petitioner,*

*vs.*

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, A CORPORATION,

*Respondent.*

HARRIS TRUST AND SAVINGS BANK,

*Petitioner,*

*vs.*

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,

*Respondent.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

January 19, 1971.

Before FAIRCHILD, CUMMINGS and PELL, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This case involves the liability for damages arising from a major railroad accident occurring on the tracks of the Chicago, Burlington and Quincy Railroad Company at Montgomery, Illinois. The facts

underlying the disaster are fully narrated in the opinion below (301 F. Supp. 72) and need only be highlighted here.

Commencing on September 25, 1964, the Chicago, Rock Island and Pacific Railroad Company was unable to use its own line to Chicago because of a defective bridge at Joliet, Illinois. Therefore, the Rock Island began to detour its trains over Burlington's Streator branch to Montgomery pursuant to a reciprocal Standard Form for Detour Agreement that had been executed by the two railroads in January, 1958.

On the night of September 27, 1964, an eastbound Rock Island passenger train received a stop signal and thereupon halted on the Streator branch a few hundred feet short of the signal bridge of the Burlington's main line. At this time, a Burlington train speeding westward on the main line received a proceed signal and ran head-on into the Rock Island train, killing 4 persons, injuring 250 other, and destroying over $1,000,000 in property.

The district court found that the Burlington had used a switching signal system that was not in proper condition and was not safe to operate. This was held to be a violation of Section 25 of the Interstate Commerce Act (49 U. S. C. § 26), and of an Interstate Commerce Commission order issued pursuant thereto (49 CFR 136). However, by virtue of the indemnification provisions in the Standard Form for Detour Agreement, the district court entered a judgment awarding the Burlington $860,218.62. The judgment also ordered the Rock Island to defend lawsuits arising out of this accident and to hold the Burlington harmless for any ensuing judgments, with the Rock Island to reimburse the Burlington for its legal expenses. Plaintiffs appeal from this decision, and we affirm.

The outcome of this case largely depends upon the proper construction to be accorded to paragraph 4 of the

Standard Form of Detour Agreement. This was adopted by the predecessor of the Association of American Railroads in 1905 and, as amended, provides:

> "The Home Company [Burlington] shall not be held liable for or on account of any loss, damage, or delay, to the trains, engines, cars or other property of any kind of either Company, nor to freight, baggage or other property of any kind carried in or upon such trains, engines or cars, nor for or on account of any injury to or death of passengers or employes of either company, or for or on account of any injury to the person or property of any other individual or individuals, company or companies, corporation or corporations whatsoever, *which may be incurred or sustained by reason of such trains being detoured, or by reason of such trains being delayed in such detouring, in whatever manner the same may be caused or occasioned, whether by or through the negligence of the Home Company, its agents or servants, or by reason of defects in tracks, structures, or facilities furnished by the Home Company, or otherwise, it being understood and agreed that all risk of such delays, loss, damage, injury and death shall be and is hereby assumed by the Foreign Company* [*Rock Island*], and the Foreign Company shall and will hold harmless the Home Company from and against all liabilities or claims for all such delay, loss, damage, injury and death, and shall and will execute and deliver, or cause to be executed and delivered, to the Home Company, upon request, a full and complete release, satisfaction and discharge of all claims therefor, and will pay, or cause to be paid, all costs and expenses incurred by either Company in the clearing of wrecks and repairs to equipment, track and property in which *by reason of detour movements covered by this agreement the engines, trains or cars of the Foreign Company are concerned,* expenses and attorney's fees incurred in defending any action which may be brought against the Home Company on account of any such claim or liability and any judgment which may be rendered against

the Home Company on account thereof. *The Foreign Company shall pay all fines, penalties, costs and expenses imposed upon or incurred by the Home Company by reason of any violation by the Foreign Company of the Safety Appliance or other State or Federal Laws, and hold the Home Company harmless therefrom.*" (Emphasis supplied.)

Rock Island first charges that the district court erroneously construed the indemnity provisions of the Detour Agreement to apply to the instant collision. Rock Island contends that the Agreement was not intended to apply where the Foreign Company's train was merely present but did not "cause" the damage. It also urges that the Agreement does not include statutory liability imposed by virtue of the Federal Safety Appliance Act. We disagree with both propositions.

The clear intent and specific language of the Agreement apply to the circumstances of this wreck. Unlike *Pennsylvania RR. Co.* v. *Indiana Harbor Belt RR. Co.*, 261 F. 2d 939 (7th Cir. 1958), relied upon by Rock Island, the instant agreement unequivocally provides for indemnity against risk of loss to the Home Company resulting from the Foreign Company's mere involvement in an accident during detour. The Agreement states that the detouring railroad must assume the risks of injury to others "which may be incurred or sustained by reason of such trains being detoured, or by reason of such trains being delayed in such detouring, in whatever manner the same may be caused or occasioned * * *." Similarly, the burden of loss to either railroad is placed upon the Foreign Company where "by reason of detour movements covered by this agreement the engines, trains or cars of the Foreign Company are concerned * * *." The clear import of such all-inclusive language is to shift all losses to the Foreign Company attributable to its occasional exercise of detour privileges, regardless of the manner of its actual involvement in the

occurrence. Cf. *Alabama Great Southern RR. Co.* v. *Louisville and Nashville RR. Co.*, 127 F. Supp. 363, 369-370 (N. D. Ala. 1955), reversed on other grounds, 224 F. 2d 1, 4 (5th Cir. 1955). The "trackage agreement" in *Pennsylvania RR. Co.* v. *Indiana Harbor Belt RR. Co., supra,* on the other hand, regulated significantly different practical arrangements and employed language limiting responsibility for indemnification to losses "caused" by trains using the right of way. We see nothing in the language or purpose of the Detour Agreement to justify the suggested distinction between "causation" by Rock Island and its mere involvement as a necessary "condition" to the occurrence.

We also conclude that the Agreement requires indemnification for losses resulting from Burlington's violation of the Federal Safety Appliance Act. The language of the Agreement provides for the broadest possible indemnification coverage. It releases the Home Railroad from liability from any loss "in whatever manner the same may be caused or occasioned, whether by or through the negligence of the Home Company, its agents or servants, or by reason of defects in tracks, structures, or facilities furnished by the Home Company, or otherwise * * *." In *Chicago, Milwaukee, St. Paul & Pacific RR. Co.* v. *Alva Coal Corporation,* 365 F. 2d 49 (7th Cir. 1966), this Court construed similar language in a trackage agreement and held that "negligence" included *per se* statutory liability imposed for violation of 45 U. S. C. § 11. Since the accident here resulted from a malfunction in Burlington's interlocking station, it is also covered by the indemnity provisions as a defect in a track, structure, or facility furnished by the Home Company, regardless of the legal theory upon which liability for such defects may rest.

In 1913, the second sentence was added to paragraph 4 of the Detour Agreement, providing:

> "The Foreign Company [Rock Island] shall pay all fines, penalties, costs and expenses imposed upon or incurred by the Home Company [Burlington] by reason of any violation by the Foreign Company of the Safety Appliance or other State or Federal Laws, and hold the Home Company harmless therefrom."

The Rock Island seizes upon this sentence to argue that no obligation was imposed upon it unless it violated the Federal Safety Appliance Act. However, as the district court noted, the first sentence of paragraph 4 does not mention fines or penalties. This additional sentence was added to cover such matters when incurred by the Home Company when the Foreign Company has violated the Federal Safety Appliance Act. This sentence has nothing to do with either the Home Company's violations of the Act or civil liabilities which it might incur. It was obviously added because the Home Company might incur a liability for a statutory penalty on account of a violation by the Foreign Company.

Rock Island objects that the conclusions below are at odds with the principle requiring "strict" construction of indemnity contracts purporting to relieve the indemnities of its own negligence. See, *e.g.*, *Auto Owners Mutual Insurance Co.* v. *Northern Indiana Pub. Serv. Co.*, 414 F. 2d 192, 194 (7th Cir. 1969). "Strict" construction, however, like "liberal" construction, is a matter of degree and emphasis, dependent not only upon the clarity of the contract's language, but the nature of the relationships established by the contract, and concern for public welfare and policy. In this case, unlike those cases relied upon by Rock Island, such as *Chicago & N. W. Ry. Co.* v. *Chicago Packaged Fuel Co.*, 195 F. 2d 467 (7th Cir. 1952), and *Pennsylvania RR. Co.* v. *Indiana Harbor Belt RR. Co.*, 261 F. 2d 939, 943 (7th Cir. 1958), the reciprocal Detour Agreement equally distributes the risks between the parties by placing them upon the shoulders of the detouring railroad. The

Agreement does not threaten to encourage carelessness on the part of the indemnitee, or to burden unfairly a party because of discrepancies in bargaining position. The language employed, though broad, is sufficiently specific and manifests the parties' intent to require indemnification by the Foreign Company regardless of the proximate "cause" of the accident or legal theory upon which liability might be grounded. Accordingly, we see no inconsistency between our conclusions here and those cases which have "strictly" construed other indemnity contracts negating a claimed right of indemnification.

These considerations also lead us to reject Rock Island's argument that the indemnity provisions of the Agreement should be invalidated as against public policy. Unlike *Boyer* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 34 Ill. App. 2d 330 (1st Dist. 1962), affirmed, 38 Ill. 2d 31 (Ill. Sup. Ct. 1967), certiorari denied, 390 U. S. 949, the distribution of risks undertaken by this contract does not impair the policies or force of the Federal Safety Appliance Act. See *Inland Container Corp.* v. *Atlantic Coast Line RR. Co.*, 266 F. 2d 857, 861 (5th Cir. 1959); *Chicago & N. W. Ry. Co.* v. *Davenport*, 205 F. 2d 589, 594 *et seq.* (5th Cir. 1953); *Jacksonville Terminal Co.* v. *Railway Express Agency, Inc.*, 296 F. 2d 256, 259, note 1 (5th Cir. 1961), certiorari denied, 369 U. S. 860. We agree with the court in *Colorado Milling & Elevator Co.* v. *Terminal RR. Association*, 350 F. 2d 273, 278-279 (8th Cir. 1965), certiorari denied, 382 U. S. 989, that these provisions of the contract represented an adjustment of the private relations between the two carriers but did not alter their duties to the public as common carriers.

Rock Island next contends that the Detour Agreement was null and void because it amounted to a "trackage right agreement" which was not authorized or approved by the Interstate Commerce Commission. We need not

consider whether such an agreement would be unenforceable under all circumstances without approval of the Commission. Nor need we decide whether Rock Island is estopped from raising this argument. We hold instead that the Detour Agreement does not constitute a "trackage right" agreement within the purview of Section 5(2)(a)(ii) of the Interstate Commerce Act, 49 U. S. C. § 5(2)(a)(ii).[1]

"Trackage rights," unlike the instant Detour Agreement, involve continuing or permanent easements or licenses granted to a foreign carrier to operate over the tracks and right of way of another carrier. See *Thompson* v. *Texas Mexican Ry. Co.*, 328 U. S. 134, 140. The thrust of the statute dealing with such adjustments, as disclosed in its heading, is to vest control over railroad unifications in the hands of the Interstate Commerce Commission. Insofar as an agreement between railroads tends to expand or alter existing carrier routes on a permanent or extended basis, they may be viewed as trackage rights. The Detour Agreement, however, is limited to extraordinary circumstances which countenance no enduring alteration in carrier routes. It is, in addition, subject to the discretionary power of the Home Company to grant or deny permission to the detouring railroad to operate over its tracks. We find nothing in the cases or rulings cited to this Court by Rock Island which compels us to conclude that such an emergency measure requires Interstate Commerce Commission approval to be enforceable.

---

1. Section 5(2)(a)(ii) of the Act states:

"(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

• • • • •

"(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto."

The final argument raised by Rock Island is that the district court erred in finding that the malfunction of the interlocking station did not constitute willful or wanton misconduct on Burlington's part. Rock Island did not plead this matter as a defense to the contract or argue it before the district court. Cf. *Seaboard Surety Co.* v. *Harbison,* 304 F. 2d 247, 249 (7th Cir. 1962). In any event, we agree with the district court that Rock Island failed to establish willful or wanton misconduct on the part of Burlington's tower operator. We find no clear error in the district court's conclusion that the operator failed to notice the warning light due to the rush of his duties, not because he simply ignored the device or failed to act upon its signal.

The judgment of the district court is affirmed.

## APPENDIX C.

### STATUTES INVOLVED.

**Title 49, § 1 (3) (a).**

**Definitions.**

(3) (a) The term "common carrier" as used in this chapter shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier." The term "railroad" as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this chapter includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

**§ 5 (2). Unifications, mergers, and acquisitions of control.** (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings

specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

**§ 5 (4). Control effected by other than prescribed methods.** It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any transaction within the scope of subdivision (a) of paragraph (2) of this section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain

control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5) of this section, the words "control or management" shall be construed to include the power to exercise control or management. Feb. 4, 1887, c. 104, Pt. I, § 5, 24 Stat. 380; June 16, 1933, c. 91, Title II, § 202, 48 Stat. 217; Sept. 18, 1940, c. 722, Title I, § 7, 54 Stat. 905.

**§ 8. Liability in damages to persons injured by violation of law.**

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

**§ 26. Safety appliances, methods, and systems—(a) Definition of carrier.**

The term "carrier" as used in this section includes any carrier by railroad subject to this chapter (including any terminal or station company), and any receiver or any other individual or body, judicial or otherwise, when in the possession of the business of a carrier subject to this section: *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway unless such railway is operated as a part of a

general steam-railroad system of transportation, but shall not exclude any part of a general steam-railroad system of transportation now or hereafter operated by any other motive power.

**Order to install systems, etc.; modification; negligence of carrier.**

(b) The Commission may, after investigation, if found necessary in the public interest, order any carrier within a time specified in the order, to install the block signal system, interlocking, automatic train stop, train control, and/or cab-signal devices, and/or other similar appliances, methods, and systems intended to promote the safety of railroad operation, which comply with specifications and requirements prescribed by the Commission, upon the whole or any part of its railroad such order to be issued and published a reasonable time (as determined by the Commission) in advance of the date for its fulfillment: *Provided,* That block signal systems, interlocking, automatic train stop, train control, and cab-signal devices in use on August 26, 1937, or such systems or devices hereinafter installed may not be discontinued or materially modified by carriers without the approval of the Commission: *Provided further,* That a carrier shall not be held to be negligent because of its failure to install such systems, devices, appliances, or methods upon a portion of its railroad not included in the order, and any action arising because of an accident occurring upon such portion of its railroad shall be determined without consideration of the use of such systems, devices, appliances, or methods upon another portion of its railroad.

**Filing report on rules, standards, and instructions with Commission; time; modification.**

(c) Each carrier by railroad shall file with the Commission its rules, standards, and instructions for the installa-

tion, inspection, maintenance, and repair of the systems, devices, and appliances covered by this section within six months after August 26, 1937, and, after approval by the Commission, such rules, standards, and instructions, with such modifications as the Commission may require, shall become obligatory upon the carrier: *Provided, however,* That if any such carrier shall fail to file its rules, standards, and instructions the Commission shall prepare rules, standards, and instructions for the installation, inspection, maintenance, and repair of such systems, devices, and appliances to be observed by such carrier, which rules, standards, and instructions, a copy thereof having been served on the president, chief operating officer, trustee, or receiver, of such carrier, shall be obligatory: *Provided further,* That such carrier may from time to time change the rules, standards, and instructions herein provided for, but such change shall not take effect and the new rules, standards, and instructions be enforced until they shall have been filed with and approved by the Commission: *And provided further,* That the Commission may on its own motion, upon good cause shown, revise, amend, or modify the rules, standards, and instructions prescribed by it under this subsection, and as revised, amended, or modified they shall be obligatory upon the carrier after a copy thereof shall have been served as above provided.

**Inspection by Commission; personnel.**

(d) The Commission is authorized to inspect and test any systems, devices, and appliances referred to in this section used by any such carrier and to determine whether such systems, devices, and appliances are in proper condition to operate and provide adequate safety. For these purposes the Commission is authorized to employ persons familiar with the subject. Such persons shall be in the classified service and shall be appointed after competitive

examination according to the law and the rules of the Civil Service Commission governing the classified service. No person interested, either directly or indirectly, in any patented article required to be used on or in connection with any of such systems, devices, and appliances or who has any financial interest in any carrier or in any concern dealing in railway supplies shall be used for such purpose.

**Unlawful use of system, etc.**

(e) It shall be unlawful for any carrier to use or permit to be used on its line any system, device, or appliance covered by this section unless such apparatus, with its controlling and operating appurtenances, is in proper condition and safe to operate in the service to which it is put, so that the same may be used without unnecessary peril to life and limb, and unless such apparatus, with its controlling and operating appurtenances, has been inspected from time to time in accordance with the provisions of this section and is able to meet the requirements of such test or tests as may be prescribed in the rules and regulations provided for in this section.

**Report of failure of system, etc., and accidents.**

(f) Each carrier shall report to the Commission in such manner and to such extent as may be required by the Commission, failures of such systems, devices, or appliances to indicate or function as intended; and in case of accident resulting from failure of any such system, device, or appliance to indicate or function as intended, and resulting in injury to person or property which is reportable under the rules of the Commission, a statement forthwith must be made in writing of the fact of such accident by the carrier owning or maintaining such system, device, or appliance to the Commission; whereupon the facts concerning

such accident shall be subject to investigation as provided in sections 40-42 of Title 45.

**Duties and powers of Commission.**

(g) It shall be the duty of the Commission to see that the requirements of this section and the orders, rules, regulations, standards, and instructions made, prescribed, or approved hereunder are observed by carriers, and all powers granted prior to August 26, 1937, to the Commission are extended to it in the execution of this section.

**Penalties; enforcement.**

(h) Any carrier which violates any provision of this section, or which fails to comply with any of the orders, rules, regulations, standards, or instructions made, prescribed, or approved hereunder shall be liable to a penalty of $100 for each such violation and $100 for each and every day such violation, refusal, or neglect continues, to be recovered in a suit or suits to be brought by the United States attorney in the district court of the United States having jurisdiction in the locality where such violations shall have been committed. It shall be the duty of such attorneys to bring such suits upon duly verified information being lodged with them showing such violations having occurred; and it shall be the duty of the Commission to lodge with the proper United States attorneys information of any violations of this section coming to its knowledge.

## APPENDIX D.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, A CORPORATION,

*Petitioner,*

*vs.*

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, A CORPORATION,

*Respondent.*

HARRIS TRUST AND SAVINGS BANK,

*Petitioner,*

*vs.*

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,

*Respondent.*

July 22, 1969.

### FINDINGS OF FACT.

This cause came on for trial and the court, having heard the evidence and considered the pleadings and the Stipulation of Facts, finds the following facts in addition to the facts found in its Memorandum and Order of July 15, 1969:

1. In violation of the provisions and requirements of Section 25 of the Interstate Commerce Act, U. S. Code, Title 49, Section 26, and the order issued by the Interstate Commerce Commission pursuant thereto dated June 29,

1950, Title 49, Code of Federal Regulations, Part 136, prescribing certain rules, standards and instructions, the defendant Chicago, Burlington & Quincy Railroad Company on September 27, 1964 used on its line of railroad in its mechanical interlocking station at Montgomery, Illinois power operated Switch 14, when said apparatus with its controlling and operating appurtenances was not in proper condition and safe to operate in the service to which put, as required by Sections 136.303 and 136.307 of Title 49 of said Code of Federal Regulations and Section 26 of Title 49 of said U. S. Code.

2. That as a direct result and in consequence of the aforesaid violations defendant Chicago, Burlington & Quincy Railroad Company's Train No. 3 collided with plaintiff Chicago, Rock Island and Pacific Railroad Company's Train No. 4 on September 27, 1964 at Montgomery, Illinois.

EDWIN A. ROBSON,
*Judge.*

Dated: July 22, 1969.

## APPENDIX E.

### STANDARD FORM FOR DETOUR AGREEMENT.

Adopted by the Association of American Railroads (or its predecessor The American Railway Association), October 25, 1905; with amendments adopted November 10, 1910, May 17, 1911, November 19, 1913, November 17, 1920, May 15, 1924, October 2, 1947, and September 3, 1957.

NOTE—This agreement should be executed on behalf of each company party thereto by an executive officer and duly attested.

THIS AGREEMENT, Executed in duplicate between Chicago, Burlington & Quincy Railroad Company, a corporation created and existing under the laws of Illinois and Chicago, Rock Island and Pacific Railroad Company a corporation created and existing under the laws of Delaware.

WITNESSETH, THAT,

WHEREAS, should the railways of either party hereto become impassable by reason of unforeseen occurrences, making detour movement desirable, each party hereto is willing whenever, in its judgment, the conditions warrant, and subject to the terms and conditions hereinafter set forth, to temporarily permit the trains of the other party, hereinafter referred to as the Foreign Company, to be run over its tracks (Home Company) as a service of accommodation and reciprocation.

NOW, THEREFORE, it is mutually agreed by and between the parties hereto as follows:

1. Whenever the Foreign Company desires to detour its trains it shall notify the Home Company, the circumstances necessitating detour movement, between what points, the number and character of trains and such other information as may be required by the Home Company. Upon receipt of such notice the Home Company shall promptly grant or refuse the accommodation requested. The granting of the accommodation will not warrant nor imply the insurance of the Foreign Company's trains against any of the risks of transportation, nor the assumption of liability therefor, by the Home Company. In the event of refusal to grant such permission, the Foreign Company shall have no claim of any nature against the Home Company by reason of such refusal.

2. The Foreign Company, if granted such permission, shall run its trains between the points designated over the tracks of the Home Company, using, unless otherwise agreed between the parties, its own engines, engine crews and train crews fully conversant with the Standard Code of the Association of American Railroads, but always with a pilot or pilots (not more than one pilot for each Foreign engine crews or train crew, nor more than two for any one train), to be furnished by the Home Company, and subject to all the rules and regulations of the Home Company, and the orders of its train dispatcher.

In case, by mutual agreement, the Home Company shall furnish engines and engine crews to haul, help or push trains of the Foreign Company, or in case, without mutual agreement, it become necessary, by reason of failure of the Foreign Company's engine to handle its train at speed required by the Home Company, or for other cause (including foreign engine not being equipped with train control or cab signals) for the Home Company to furnish engines and engine crews to haul, help or push trains of

the Foreign Company, it may do so, and except at its option, without releasing pilot or pilots previously assigned to the train.

3. The Foreign Company, if granted such permission, shall promptly, upon presentation of bill, pay to the Home Company for trackage, the sum of Three Dollars and Fifty Cents ($3.50)* per train mile, or fraction thereof (a light engine to be considered as a train), with minimum trackage charge of Twenty-Two Dollars and Fifty Cents ($22.50) for each train detoured. The Foreign Company shall also reimburse the Home Company for any extra expenses incurred by the employment of additional operators, dispatchers, or others, or overtime paid any employe resulting directly from the detour movement.

The cost of labor referred to in this Agreement includes not only actual wages but in addition expenses covering vacation allowances, railroad retirement charges, unemployment insurance, all payroll taxes, etc., actually incurred. Additional charges for other services rendered and supplies furnished by the Home Company shall be charged to the Foreign Company at the rates specified below:

| | When engine and engine crew are furnished | |
|---|---|---|
| | By Foreign Company Sec. 2, Par. 1 | By Home Company Sec. 2, Par. 2 |
| (a) Per engine mile, including light mileage to and from point of service** | None | $4.50 |
| (b) Per engine tank for water furnished | $2.25 | None |
| (c) Per engine turned on turntable or wye*** | $2.25 | None |
| (d) Per car turned on turntable*** | $2.25 | $2.25 |
| (e) Per train turned on wye*** | $6.75 | $6.75 |
| (f) Fuel | Cost including any freight charges assessed by Foreign Roads and charges over Home Road calculated at tariff rates to point of delivery plus 10% of total. | None |
| (g) Other engine supplies | Cost plus 10% | None |
| (h) Other train supplies | Cost plus 10% | Cost plus 10% |
| (i) Enginehouse expenses | Cost plus 10% | None |
| (j) Engine repairs | Cost plus 10% | None |
| (k) Pilots, including deadhead or light mileage to and from point of service, and furnished in accordance with Section 2, paragraphs 1 and 2 | Cost plus 10% | Cost plus 10% |
| (l) Crews furnished to relieve Foreign train or engine crews, including deadhead or light mileage to and from point of service | Cost plus 10% | Cost plus 10% |
| (m) Bridge, ferry, terminal, trackage or switching charges assessed by other carriers in connection with handling detoured trains | Contract or tariff rates | Contract or tariff rates |

*Includes wages of car inspectors inspecting detoured trains at regular inspection points.

**Includes use of engine and all labor and supplies to operate same.

***No mileage charge to be included.

4. The Home Company shall not be held liable for or on account of any loss, damage, or delay, to the trains, engines, cars or other property of any kind of either company, nor to freight, baggage or other property of any kind carried in or upon such trains, engines or cars, nor for or on account of any injury to or death of passengers or employes of either company, or for or on account of

any injury to the person or property of any other individual or individuals, company or companies, corporation or corporations whatsoever, which may be incurred or sustained by reason of such trains being detoured, or by reason of such trains being delayed in such detouring, in whatever manner the same may be caused or occasioned, whether by or through the negligence of the Home Company, its agents or servants, or by reason of defects in tracks, structures, or facilities furnished by the Home Company, or otherwise, it being understood and agreed that all risk of such delays, loss, damage, injury and death shall be and is hereby assumed by the Foreign Company, and the Foreign Company shall and will hold harmless the Home Company from and against all liabilities or claims for all such delay, loss, damage, injury and death, and shall and will execute and deliver, or cause to be executed and delivered, to the Home Company, upon request, a full and complete release, satisfaction and discharge of all claims therefor, and will pay, or cause to be paid, all costs and expenses incurred by either Company in the clearing of wrecks and repairs to equipment, track and property in which by reason of detour movements covered by this agreement the engines, trains or cars of the Foreign Company are concerned, expenses and attorney's fees incurred in defending any action which may be brought against the Home Company on account of any such claim or liability and any judgment which may be rendered against the Home Company on account thereof. The Foreign Company shall pay all fines, penalties, costs and expenses imposed upon or incurred by the Home Company by reason of any violation by the Foreign Company of the Safety Appliance or other State or Federal Laws, and hold the Home Company harmless therefrom.

5. In no case shall the Foreign Company do any local freight or passenger business whatever on the tracks of the Home Company without its consent.

All mileage and per diem accruing on cars in detoured trains shall be assumed by the Foreign Company and reported and paid by it direct to owners of cars.

6. (Special provisions.)

7. All differences soever which shall, consequent upon the detouring of trains, arose under this agreement, or otherwise, between the parties shall be submitted to the Committee on Operating Rules, Operating-Transportation Division, as then constituted, of the Association of American Railroads on thirty (30) days' written notice to the other party. All proceedings before such Committee shall be had in accordance with such rules as it shall, from time to time, promulgate and the decision of such Committee shall be final and binding on and accepted as such and performed by all the parties.

8. All existing understandings and agreements between the parties hereto, or their predecessors, relating to matters included herein, are hereby abrogated and made void except that neither of the parties hereto shall be released from any liability which may have arisen under agreements and understandings in effect prior to the date of execution of this agreement.

9. The covenants of this agreement shall be binding upon and inure in favor of the successors and assigns of the parties hereto, respectively, and the same shall be and remain in force upon the date hereof until terminated by either party giving to the other ninety (90) days' notice in writing, fixing the date of such termination, and upon the date stated in such notice this agreement shall cease and determine.

IN WITNESS WHEREOF, the parties hereto have executed this agreement in duplicate this 10th day of January, 1958.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY
By /s/ E. POTARF
*Its General Manager*

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD CO.
By /s/ R. E. JOHNSON
*Its Vice President-Operations*

Approved as to form
/s/ RAYMOND E. SKOV
*Attorney*

ATTEST:
/s/ M. Z. GREENLY
*Secretary*

Supreme Court, U.S.
FILED
MAY 5 1971
E. ROBERT SEAVER, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970.

**No. 1566**

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
*Petitioner,*

*vs.*

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,
*Respondent.*

HARRIS TRUST AND SAVINGS BANK,
*Petitioner,*

*vs.*

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970.

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**No. 1566**

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CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,

*Petitioner,*

*vs.*

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,

*Respondent.*

---

HARRIS TRUST AND SAVINGS BANK,

*Petitioner,*

*vs.*

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,

*Respondent.*

---

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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MAY IT PLEASE THE COURT:

## I.

### CERTIORARI SHOULD BE DENIED BECAUSE THE PETITION PRESENTS NO QUESTION WORTHY OF REVIEW BY THIS COURT.

The petition presents no question worthy of review by this Court under the criteria laid down in Rule 19.

The basic question involved is merely the legality of a "Detour Agreement" entered into between the Rock Island and the Burlington in 1958. This is a standard form of agreement that was adopted by the Association of American Railroads in 1905. As interpreted by the lower courts, a railroad ("foreign" road) which "detours" over the line of another railroad ("home" road) assumes all risks of transportation. Specifically, they held that, under its terms, the Rock Island was obligated to bear all losses arising out of a collision between a Rock Island and a Burlington train, notwithstanding the collision was due to a defect in an interlocking plant that violated Section 25 of the Interstate Commerce Act.

This "Detour Agreement" was entered into between two bargaining equals and the indemnity and exoneration provisions held valid are reciprocal, inasmuch as a particular railroad may be the "home" railroad on one occasion and the "foreign" road on the next. In transportation emergencies, it permits railroads, in the home road's discretion, to quickly borrow the use of each other's tracks by working with each other at lower management levels. It is intended to promote the use of quick alternatives by which the "foreign" road can efficiently move persons and goods around emergency conditions on the foreign road's own tracks, that temporarily block its own operations.

The petition asserts that the Detour Agreement is invalid for two reasons, viz.: It took away the Rock Island's alleged right to recover under the Interstate Commerce Act and it was a "trackage rights agreement" which had not been approved by the Interstate Commerce Commission.

We submit, the legality of a form provision between members of the railroad industry, allocating the risks of transportation in the event of a detour by one railroad over the lines of another, presents no question of national importance that is worthy of review by this Court.

Moreover, this case presents no question of importance even to the railroad industry, in the sense that it involves questions that constantly recur. The questions presented are being raised for the first time since the "Detour Agreement" was adopted in 1905 and it may be another 65 years, or even more, before they are ever presented again. This Court's certiorari jurisdiction should not be exercised to determine rare and non-recurring points of law.

The "trackage rights" point was not even raised in the District Court, as its opinion shows (App. 1a-14a), although the Court of Appeals, despite the procedural infirmity, did consider it, and ruled adversely to the Rock Island (App. 8b). A question considered to be of such little importance by petitioner that it was not even raised in the District Court cannot now be so important as to merit further consideration by this Court.

In respect to the claim that federal public policy was violated because the Rock Island contracted away an alleged right to recover under Section 8 of the Interstate Commerce Act for the Burlington's violation of Section 25, the Rock Island proceeds on the assumption that the Railroad Safety Acts were intended to protect corporations, and other railroads in particular. We show to the contrary in

the next proposition. But whether the Rock Island's position is correct or not, the question presented certainly is not of national importance.

The first Federal Safety Appliance Act was passed in 1893 (45 U. S. C. § 1). This is the first time that it has ever been contended that corporations, as distinguished from people, were intended to be protected by the Safety Acts. Hence, this is also the first case in which it has ever been contended that a railroad or other corporation could not validly contract away this claimed right to recover. The complete absence of litigation on the precise issues shows that the detour arrangement has worked well. The railroads have been able to interpret and administer the provisions of the Detour Agreement between themselves and virtually without resort to the Courts.

Indeed, in all the years the Detour Agreement has been in force, only one other case has considered it, namely, *Alabama Great Southern R. R. Co.* v. *Louisville & Nashville R. R. Co.*, 127 F. Supp. 363 (N. D. Ala., 195), rev'd on other grounds, 224 F. 2d 1, 4 (C. A. 5, 1955), and the questions involved in that litigation did not involve either of the questions raised by the petition. We suggest, therefore, that the legality of an agreement that has been administered and interpreted by an industry for so many years, and with virtually no controversy, does not present a question of importance to anyone but the immediate parties involved.

Moreover, the function of courts normally is to hold parties to their contracts. An attempt by a party to escape its contract obligations, by leave of Court, is not a proceeding which this Court should entertain in the absence of national public interest considerations, completely absent here. The Rock Island has enforced the agreement against others (A. 53). This Court should not determine whether

the Rock Island should be released, by leave of Court, when the agreement is sought to be enforced against it.

Almost fifty years ago, when this Court's certiorari load was much lighter, Mr. Chief Justice Taft said: "The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co., Inc.* v. *Coty,* 262 U. S. 159, 163 (1923). The same year he also stated for the Court that the writ should not be granted "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp.* v. *Western Well Works,* 261 U. S. 387, 393 (1923).

Mr. Justice Frankfurter, another Justice who repeatedly emphasized that the role of this Court is to decide questions of national importance, in speaking for the Court in *Rice* v. *Sioux City Memorial Park Cemetery, Inc.,* 349 U. S. 70, 74 (1955), said:

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants."

It is difficult to conceive of questions less "cert-worthy" than those presented by the petition. Irrespective of whether the determinations of the Court of Appeals were right or wrong, the petition should be denied because the questions presented are totally devoid of any national importance.

## II.

## CERTIORARI SHOULD BE DENIED ALSO BECAUSE THE DECISION OF THE COURT OF APPEALS IS CORRECT.

### A.

### Even if the Rock Island Be Considered a Member of the Class Protected by Section 25 of the Interstate Commerce Act, It Could Validly Bargain Away Any Right to Recover Under That Act.

Petitioner's basic claim is that it was given a right of action by Section 8 of the Interstate Commerce Act for a violation of Section 25 and that it could not validly bargain away its right to recover under that Act. There are two answers to this contention:

1. Petitioner corporation* is not a member of the class for whose benefit the statute was based; and

2. A person possessing equal bargaining power with another can validly contract away a right of recovery under an "absolute duty" statute such as one of the Railroad Safety Acts.

First, we consider whether petitioner was intended to be protected by Section 25. This Court has stated repeatedly that, in order for a person to base a civil cause of action upon a violation of one of the Railroad Safety Appliance Acts, he must be a member of the class for whose benefit the statute was passed. *Texas & Pacific Ry. Co.* v. *Rigsby,* 241 U. S. 33 (1916); *St. Louis & San Francisco Ry. Co.* v. *Conarty,* 238 U. S. 243 (1915); *Lang* v. *New York Central R. Co.,* 255 U. S. 455 (1921); *Fairport, P. & E. R. Co.* v. *Meredith,* 292 U. S. 589 (1934); *Brady* v. *Terminal R. R. Ass'n,* 303 U. S. 10 (1938). Thus, it has held that the various Railroad Safety Acts were intended for the protec-

* Inasmuch as the petition proceeds as if the Rock Island were the sole petitioner (p. 2), we do likewise.

tion of *people* standing in various relationships to a railroad: railroad employees (*San Antonio & Aransas P. Ry. Co.* v. *Wagner*, 241 U. S. 476 (1916)), employees of another railroad (*Brady* v. *Terminal R. R. Ass'n*, 303 U. S. 10 (1938)), and travelers on the highway (*Fairport, P. & E. R. Co.* v. *Meredith*, 292 U. S. 589).

The clear implication of the above holdings of this Court is that there are "persons" who are not protected by the Acts. Petitioner is a corporation; hence, the only kind of loss it can suffer from a violation of a Safety Appliance Act is a monetary one. If the Acts protect corporations from monetary loss, then it is impossible to imagine the existence of those not protected.

With the above decisions in mind, we consider whether Section 25 was intended by Congress to protect corporations.

Congress has passed a series of Railroad Safety Appliance Acts. The first Act passed in 1893 (45 U. S. C. §§ 1-7), was amended by an Act of March 2, 1903 (45 U. S. C. §§ 8-10), and supplemented by an Act of April 14, 1910 (45 U. S. C. §§ 11-18). Then followed the Hours of Service Act in 1907 (45 U. S. C. §§ 61-64), and the Ash Pan Act (45 U. S. C. §§ 17-21) in 1908, and the Boiler Inspection Act of February 17, 1911 (45 U. S. C. §§ 22-34). Non-employees must look to state law to recover under them. *Crane* v. *Cedar Rapids & I. C. R. Co.*, 395 U. S. 164 (1969).

The foregoing statutes, although giving the Interstate Commerce Commission authority to administer them, were not passed as amendments to the Interstate Commerce Act of 1887. The first Railroad Safety Act to be passed as an amendment to the Interstate Commerce Act was the Transportation Act of 1920. Section 441 amended the Interstate Commerce Act of 1887 by adding Section 26, which authorized the Commission to order railroad carriers to

install automatic train-stop or train-control or other safety devices (41 Stat. 498).

Section 26 of the 1920 Act was repealed and the section was completely rewritten by the Act of August 26, 1937 (50 Stat. 835). Section 26 of the 1937 Act, in rewriting the 1920 amendment, added subsection (e), upon which the Rock Island relies. (It was renumbered Section 25 by Section 14(b) of the Act of September 18, 1940, 54 Stat. 919.) The Committee reports show that Congress enacted the new statute to promote the *safety of passengers and employees upon railroads.* The Senate Report (Sen. Rep. 222 to accompany S. 29, 75th Cong., 1st Sess.) states in part:

> "The provisions of the bill follow closely the provisions of existing safety laws having to do with railway appliances. * * *"

The House Report (H. R. 1081 to accompany S. 29) made substantially the same statements.

The purpose of all the Railroad Safety Appliance Acts was to protect *the lives and limbs of people only;* there was no intent by Congress to protect property rights of corporations. This is explicit by the language of the Acts and their titles. The command of Section 25(e), the Act here involved, relates only to "unnecessary peril to life and limb" and says nothing about property. This is the same language used in the Boiler Inspection Act, whose "prime purpose" is "the protection of employees and others." *Lilly* v. *Grand Trunk Western R. R. Co.,* 317 U. S. 481, 486 (1943).

Thus, although the Rock Island's claim is literally within the terms of Section 8, there is nothing to show that Congress, in passing the 1937 Act, as an amendment to the Interstate Commerce Act, intended to take the drastic and novel step of protecting corporations against monetary loss.

Merely because the Rock Island is literally within the

terms of the Interstate Commerce Act does not mean that it is a member of the class Congress intended to protect. "It is a 'familiar rule, that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit nor within the intention of its makers'." *National Woodwork Mfrs. Ass'n* v. *N. L. R. B.*, 386 U. S. 612, 619 (1967). For example, in *Randall* v. *B. & O. R. Co.*, 109 U. S. 478, 485 (1883), a statute gave a right of action to "any person injured" by its violation. This Court held that plaintiff could not recover on account of its violation because he was not within the class of persons intended to be protected by it.

This is 1971 and the Safety Appliance Acts have been on the books since 1893. So far as we have been able to determine, no railroad, or other corporation, has ever maintained that it had a right to recover for monetary loss caused by a violation of a Railroad Safety Appliance Act. This is persuasive evidence that corporations have never been regarded as being protected by the Acts.

But, even if it be assumed that the Rock Island was a member of the protected class, it could validly bargain away its right to recover under a contract made with a bargaining equal which also bargained away its right to recover for negligence or statutory violations when it was a foreign railroad on the Rock Island's line.

The Burlington was not acting in its capacity as a common carrier when it permitted the Rock Island to use its tracks and facilities under the Detour Agreement. *Blank* v. *Illinois Central Ry. Co.*, 182 Ill. 332, 337, 55 N. E. 332 (1899). The Detour Agreement gave it the right to refuse permission to use its facilities, unilaterally and arbitrarily. In a similar situation, the Rock Island could do likewise (Pn. 2e). Cases beyond number hold that a railroad, when not performing its duties as a common carrier in relation to another person, may lawfully contract to be exonerated or indemnified against the consequences of its own negligence.

*Santa Fe, P. & P. Ry.* v. *Grant Bros. Const. Co.*, 228 U. S. 177, 185 (1913); *Baltimore, etc. R. R.* v. *Voigt*, 176 U. S. 498 (1900); *Robinson* v. *B. & O. R. R. Co.*, 237 U. S. 84 (1915).

Merely because the Safety Appliance Acts impose an "absolute duty" is no reason why a railroad may not contract against liability for exoneration with a bargaining equal for violations when not acting as a common carrier. This has been the unbroken course of decision under these Acts as well as under various state statutes that impose absolute civil liability for violation.

The authorities uniformly hold that a railroad, when not acting as a common carrier, may validly contract with another that the latter will indemnify the railroad against liability to one of its employees on account of the railroad's violation of a Safety Appliance Act. *Colorado Milling & Elevator Co.* v. *Terminal R. R. Ass'n*, 350 F. 2d 273 (C. A. 8, 1965), *cert. den.* 382 U. S. 989; *Jacksonville Terminal Co.* v. *Railway Express Agency, Inc.*, 296 F. 2d 256, 259 (C. A. 5, 1962), *cert. den.* 369 U. S. 860 (1962); *Inland Container Corp.* v. *Atlantic Coast Line R. Co.*, 266 F. 2d 857 (C. A. 5, 1959); *C. & N. W. Ry. Co.* v. *Davenport*, 205 F. 2d 589, 594 (C. A. 5, 1953); *Terminal R. Ass'n of St. Louis* v. *Ralston-Purina Co.*, 352 Mo. 1013, 180 S. W. 2d 693 (1944). It may also exempt itself from liability under state statutes which impose "absolute liability" for their violation. *Sunlight Carbon Co.* v. *St. Louis & S. F. R. Co.*, 15 F. 2d 802, 805 (C. A. 8, 1926) ("* * * we perceive no reason why a railroad company may not, when acting in its private capacity, relieve itself from an absolute liability imposed by statute as well as from liability resulting from negligence"); *Pettit Grain & Potato Co.* v. *Northern Pacific R. Co.*, 227 Minn. 225, 35 N. W. 2d 127, 136 (1948); Annotation in 175 A. L. R. 8, at p. 108.

Petitioner strongly relies upon *Boyer* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 34 Ill. App. 2d 330, 181 N. E. 2d 372 (1962), aff'd 38 Ill. 2d 31 (1967), 230 N. E. 2d 173, *cert. den.* 390 U. S. 949 (1968). There the Illinois Court refused to enforce an exculpatory clause in a pass where plaintiff's injuries resulted from a violation of a Railroad Safety Act.

Petitioner's attempt to equate a form exculpatory clause in a pass thrust upon a passenger, probably unaware of what the clause meant, with reciprocal indemnity and exoneration provisions voluntarily entered into between two bargaining equals is an absurdity.

The so-called "contract" held contrary to public policy in *Boyer* was an "adhesion contract," which contracts are treated entirely differently by the Courts as to construction and validity. *Chandler* v. *Aero Mayflower Transit Co.*, 374 F. 2d 129, 135 (C. A. 4, 1967); *Standard Oil of California* v. *Perkins*, 347 F. 2d 379, 383 (C. A. 9, 1965). "Contracts of adhesion" have been held void and ineffective to bar even a claim for simple tort liability. *Corbin on Contracts*, Vol. 6A, § 1472, p. 599; *Henningsen* v. *Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A. 2d 69, 95 (1960); *Haley* v. *Merit Chevrolet, Inc.*, 67 Ill. App. 2d 19, 30 (1966).

The petition also relies upon *Brooklyn Bank* v. *O'Neil*, 324 U. S. 697 (1945) (p. 10), which involved the release of a right to minimum wages under the Fair Labor Standards Act. This is a typical case involving unequal bargaining power between the parties. *Bisso* v. *Inland Waterways*, 349 U. S. 85 (1955), held that a towboat owner may not validly contract against all liability for negligent towage. One of the reasons given was "to protect those in need of goods or services from being overreached by others who have power to drive hard bargains" (p. 91). This kind of policy consideration, which is probably the one most fre-

quently applied, holding contracts invalid as contrary to public policy, is not applicable to a Detour Agreement. *Northwest Airlines, Inc.* v. *Alaska Airlines, Inc.*, 351 F. 2d 253 (C. A. 9, 1965), held that an agreement by a user of an Alaska airport to indemnify the operator against his negligence was contrary to public policy under Alaska law because the operation of the airport was a "public service" (p. 256).

In this case, the parties are of equal bargaining power. The burdens of the contract are equal on all contracting parties because, while a railroad may be a Foreign company on one occasion, it may be the Home company on the next. The public policy of expediting train movements during emergencies is served by allowing railroads to say to each other that in case of an accident, the Foreign company shall bear all loss arising from its presence. The railroads' obligations to the public are not in the slightest degree diminished by the Detour Agreement. The Burlington's judgment against the Rock Island includes sums it has paid out in claims to passengers and employees. (A. 52, 86). The Rock Island is also obligated to pay all claims arising from the collision (A. 86). Virtually all of these claims have now been settled. Since the parties could not by any private arrangement avoid their liabilities to the public, if, for any reason the Rock Island would be unable to pay any remaining claims, a person injured would still have his right of action against the Burlington. In short, since the public remains fully protected there is no public policy obstacle to enforcement of the agreement.

In 1900 this Court, in *Baltimore and Ohio Southwestern Railway Company* v. *Voigt*, 176 U. S. 498, 505, emphasized the strong public policy involved in holding parties to their contracts. The lapse of more than seventy years has in no degree weakened this public policy.

B.

**The Holding of the Court of Appeals That the Detour Agreement Is Not an Unlawful Trackage Rights Agreement Is Not Contrary to the Decisions of the Interstate Commerce Commission.**

The contention of Rock Island (Pn. 13-16) that the Detour Agreement is an unlawful trackage rights agreement because it was not approved by the Interstate Commerce Commission under Section 5(2) of the Interstate Commerce Act was raised for the first time in the Court of Appeals. In the District Court, Rock Island expressly stipulated that its detour operations over the line of the Burlington were "under the terms of " the Detour Agreement (A. 41). The Court of Appeals could thus properly have held that Rock Island's contention could not be raised upon appeal because it had not been raised in the trial court,* because it was contrary to and inconsistent with the theory of Rock Island's case in the trial court,** and because Rock Island was estopped from attacking an agreement under which it had accepted benefits.***

The Court of Appeals nevertheless elected to consider the merits of Rock Island's point, and correctly held (Pn. 8b) that Section 5(2) applies to trackage rights of a "continuing or permanent" nature, and not to a temporary

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* *Pullman's Car Co.* v. *Central Transportation Co.*, 139 U. S. 62, 63 (1891); *Adams* v. *Mills*, 286 U. S. 397, 416-417 (1932); *Denver Stock Yard Co.* v. *United States*, 304 U. S. 470, 484-485 (1938).

** *Virginian Ry. Co.* v. *Mullens*, 271 U. S. 220, 227-228 (1926); *City and County of Denver* v. *Denver Tramway Corp.*, 23 F. 2d 287, 296 (C. A. 8, 1927), *cert. den.* 278 U. S. 616 (1928); *Cleary* v. *Indiana Beach, Inc.*, 275 F. 2d 543, 547 (7th Cir., 1960).

*** *United States ex rel. International Contracting Co.* v. *Lamont*, 155 U. S. 303, 309 (1894); *Motter* v. *Patterson*, 68 F. 2d 252, 260 (10th Cir., 1933); *Marshall* v. *New York Central R. Co.*, 218 F. 2d 900, 906 (7th Cir., 1955).

emergency use by one carrier of tracks of another. This holding is not contrary to any of the cited decisions of the Interstate Commerce Commission.

The decisions of the Commission in *Texas Midland Rail road,* 75 I. C. C. 1 (1918), and *Louisiana, A. & T. Ry. Co. Operation,* 170 I. C. C. 602, were decided before Section 5(2) was enacted, and did not involve agreements for temporary use of tracks in an emergency situation. The statement in *Texas Midland Railroad* (75 I. C. C. at 125), that "[s]ometimes the use will be occasional, but once a week, or even once a year," merely points up the fact that trackage rights may exist even though the need for using them may be occasional. The Detour Agreement does not grant any right to detour, but is a reciprocal agreement by which the parties fix the terms and conditions which shall govern a detour movement *if* such a movement is authorized in a particular situation (Pn. 1e-3e).

The decision in *Chicago, S. S. & S. B. R. Trackage Rights, Cook County, Ill.,* 307 I. C. C. 329 (1959), not only is not inconsistent with, but actually supports, the holding of the Court of Appeals. That case involved an application of the Chicago South Shore and South Bend Railroad under Section 5(2) for authorization to continue the operation of passenger trains over the line of the Illinois Central Railroad between its Kensington Station on the south side of Chicago and its Randolph Street Station in downtown Chicago. The Illinois Central submitted a valuation base for the assessment of rental which included terminal facilities north of Randolph Street that the South Shore would not use except possibly in case of an emergency. After observing that there was no evidence that the South Shore made any present use of the tracks north of Randolph Street, the Commission said that "[o]nly in the event of an emergency, such as a derailment, which oc-

curred in 1956, would the South Shore trains operate north of Randolph Street." The Commission concluded by stating that the tracks north of Randolph Street "should not be considered as property normally used or available for use by the South Shore in its operation, nor should the value thereof be included in the valuation base upon which the South Shore is to be assessed a rental." 307 I. C. C. at 343. The decision thus plainly indicates that the Commission was of the view that Section 5(2) relates to tracks "normally used or available for use," and not to tracks which might be used "[o]nly in the event of an emergency."

The Commission is charged (49 U. S. C. § 12(1)) with the duty of executing and enforcing the provisions of the Interstate Commerce Act. The fact, mentioned by Rock Island (Pn. 6, 13), that the Commission has never approved the Detour Agreement, notwithstanding its long and widespread use throughout the railroad industry, together with the further fact that the Commission's published reports do not show that any application has ever been filed by any carrier for such approval, evidences a practical construction of Section 5(2) by the railroad industry and by the tribunal charged with the enforcement of the statute that is contrary to the construction urged by Rock Island.

The practical construction of Section 5(2) is consistent with the emergency service provisions in Section 1(15) of the Interstate Commerce Act (49 U. S. C. § 1(15)). Under those provisions, the Commission, in case of an emergency, is authorized "to require * * * joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals * * * upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may

after subsequent hearing find to be just and reasonable * * *". This statutory provision definitely shows that Congress not only was willing, but actually preferred, that the terms for temporary use of tracks in an emergency be fixed by the carriers involved.

C.

**Even if the Detour Agreement Was an Unauthorized Trackage Rights Agreement Within the Meaning of Section 5(2) of the Interstate Commerce Act, Its Indemnity Provisions Are Not Void.**

Congress has not declared that unauthorized trackage rights agreements shall be void, as Rock Island erroneously suggests (Pn. 13), but has merely declared them "unlawful" (49 U. S. C. § 5(4).* A contract which is made unlawful by a statute will not be held void unless the legislative intention to invalidate is clear. *Harris* v. *Runnels,* 53 U. S. (12 How.) 79, 84-85 (1851); *Macco Construction Co.* v. *Farr,* 137 F. 2d 52, 55-56 (9th Cir. 1943); *McCullough Transfer Co.* v. *Virginia Surety Co.,* 213 F. 2d 440, 442 (6th Cir. 1954); *Talco Capital Corp.* v. *Canaveral International Corp.,* 225 F. Supp. 1007, 1013-1014 (S. D. Fla. 1964), *aff'd sub nom. Canaveral International Corp.* v. *Talco Capital Corp.,* 344 F. 2d 962 (5th Cir. 1965); *Ets-Hokin & Galvan, Inc.* v. *Maas Transport Inc.,* 380 F. 2d 258, 260-261 (8th Cir.), *cert. den.* 389 U. S. 977 (1967). In the case last cited, a contract for transportation services which was in violation of the Interstate Commerce Act was nevertheless held "valid and enforceable."

* In the case of railroad securities, for example, Congress adopted a different policy. In Section 20a(2) of the Interstate Commerce Act Congress declared that the issuance of securities without Commission authorization is "unlawful," and in Section 20a(11) it expressly declared that securities so issued are "void," 49 U. S. C. § 20a(2) and (11).

The case of *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134 (1946), cited by Rock Island (Pn. 13), is not one where this Court refused to enforce a trackage rights agreement that had not been approved by the Interstate Commerce Commission. The case related to the reasonable value of the use made of a line of railroad *after* the trackage rights agreement had been terminated, and this Court held that the question of a reasonable trackage rental should have been referred by the trial court to the Commission for an administrative determination. 328 U. S. at 146-151. The decision in *Chicago & N. W. Ry. Co.* v. *Peoria & P. U. Ry. Co.*, 319 F. 2d 117 (7th Cir. 1963), *cert. den.* 375 U. S. 969 (1964), which Rock Island also cites (Pn. 13-14), was one where anticompetitive clauses in a contract that were injurious to the public were held to be in violation of the Sherman Act. 319 F. 2d at 121-122.

## CONCLUSION.

For the reasons above stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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